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No. 448

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF MIAMI BEACH,
a Florida municipal corporation

Petitioner

vs.

HYMAN KIRSNER and IDA KIRSNER, his wife

Respondents

Petition for a Writ of Certiorari to The Supreme Court of the State of Florida; To the Third District Court of Appeal of Florida; And to the Circuit Court of the Eleventh Judicial Circuit of the State of Florida

---

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---

The petitioner, the CITY OF MIAMI BEACH, a municipal corporation of the State of Florida, created by a Special Act of the Legislature, prays that this Court issue its writ of certiorari to the Supreme Court of the State of Florida; to the Third District Court of Appeal of Florida; and to the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, to review the final decree of the latter Court made and entered on the 3rd day of August, 1964, and the final order of the Third District Court of Appeal of Florida entered on August 10, 1965 (petition for rehearing denied September 13, 1965); and to review the order of the Florida Supreme Court entered on March 30, 1966 (petition for rehearing

denied on May 17, 1966) denying the City's petition for a writ of certiorari to the Third District Court of Appeal of Florida.

OPINIONS BELOW

The decree of the Circuit Court of the Eleventh Judicial Circuit of Florida was entered on the 3rd day of August, 1964 and is set forth in full in the appendix hereto.

The Order and Judgment of the Third District Court of Appeal is reported officially as "City of Miami Beach v. Kirsner, 178 So. 2d 65. The opinion is set forth in full in the appendix hereto.

The order of the Florida Supreme Court denying the City's petition for a writ of certiorari to the Third District Court of Appeal was without opinion.

On the 7th day of July, 1966, the Florida Supreme Court entered its order granting the City a stay of sixty days within which to seek a writ of certiorari from the United States Supreme Court. This order is set forth in full in the appendix hereto.

STATEMENT OF GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3), because the petitioning City has been deprived of due process of law and denied the equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution by state action through the decree of the Circuit Court of the

Eleventh Judicial Circuit of the State of Florida, the decision and judgment of the Third District Court of Appeal of Florida and the decision and judgment of the Florida Supreme Court, agencies of the State of Florida.

The decisions on which review is sought were rendered by the highest courts of the state. All appellate remedies of the state courts have been exhausted.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Section 6, Chapter 7672, Laws of Florida, 1917, as amended by Chapter 16562, Laws of Florida, Acts of 1933.

STATEMENT OF THE CASE

Procedural History of the Case

The respondents filed a suit in chancery in the Circuit Court of the Eleventh Judicial Circuit of Florida against the City to enjoin it from "maintaining a 'trim dump" on a tract of land on Star Island, which tract was conveyed to the City for park purposes. The complaint alleged that the maintenance of the "trim dump" was in violation of the condition of the conveyance and that it also constituted a public nuisance. The City filed its answer to the complaint, denying all the material allegations thereof.

Following the taking of testimony at the final hearing, the Circuit Court entered a final decree in which the City was ordered to:

> "b) Remove the presently existing hedge which delineates the area of the said 'trim dump'.
>
> c) Landscape the area which is presently being used as a 'trim dump' in conformity with the rest of the STAR ISLAND PARKWAY
>
> 4. That the Defendant, CITY OF MIAMI BEACH, be, and it is hereby, permanently enjoined from using any of the land on STAR ISLAND PARKWAY as a dumping ground for any and all refuse and waste matter and other foreign materials."

The City thereupon appealed to the Third District Court of Appeal of Florida which, thereafter, confirmed the decree of the Circuit Court. Its opinion is reported in City of Miami Beach v. Kirsner, 178 So. 2d 65, and is set forth in full at pages 5 to 6 of the appendix hereto.

Thereafter, the Florida Supreme Court denied the City's petition for a writ of certiorari to the Third District Court of Appeal of Florida.

QUESTION PRESENTED

Is the petitioner, the City of Miami Beach, a municipal corporation, together with its residents, citizens and inhabitants, to be deprived of the use of its property without due process of law, contrary to the Fifth and

Fourteenth Amendments by the decisions of the Circuit Court of the Eleventh Judicial Circuit of Dade County, Florida; the Third District Court of Appeal of Florida; and the Florida Supreme Court?

HOW FEDERAL QUESTION WAS PRESENTED

The federal question was presented in these proceedings by petitioner's petition for rehearing in the Florida Supreme Court, which sets forth, in part, the following:

> "5. The Court overlooked or failed to consider that the decision of the Circuit Court, as affirmed by the Third District Court of Appeal, is in conflict with the decision of this court in **Beckman v. Marshall,** 85 So. 2d 552, which holds that the 'inquiry is whether the act or use was a reasonable exercise of the dominion, which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy.' The denial by the Circuit Court and the Third District Court of Appeal of the City's exercise of its dominion over its property in accordance with the standards so delineated deprives the City of its property rights in violation of the Fourteenth Amendment of the United States Constitution."

REASONS FOR GRANTING WRIT OF CERTIORARI

The orders and judgments of the Circuit Court, the Third District Court of Appeal of Florida and the Florida Supreme Court violate the Fifth and Fourteenth Amendments to the United States Constitution.

The City of Miami Beach is the owner of a certain parcel of land. By the terms of the deed under which it obtained title, it is required to use this for park purposes only. The City's Charter authorizes it to do so. The Charter provides: that the City has the power "to acquire by purchase, gift, devise, bequest, lease or other agreement, real and personal property for the benefit of the City, its citizens and its winter and summer visitors . . . including in such property realty for park, recreational and public amusement purposes . . . to improve and develop such realty by constructing thereon parks, gardens, golf courses, fair and carnival grounds and public concourses . . ." Section 6, Chapter 7672, Laws of Florida, 1917, as amended by Chapter 16562, Laws of Florida, 1933:

The judicial decrees complained of confiscate and take away this park from the City without compensation.

The decrees require the removal of an existing hedge. Such removal means the destruction of the trees and shrubs which comprise this hedge. This destruction is wholly needless and constitutes an irreparable injury to the entire City with corresponding benefit to no one.

The judicial mandate to landscape a particular area in conformity with the remainder of the park is so vague,

formless and uncertain that the City can never determine whether its action is obedient to, or in defiance of, the Court's order.

In addition, the decree requires the City to perpetually expend money in the maintenance of the park in its present state for the benefit of a single individual, even though it may be desirable or necessary for the City to make changes in the care and development of this park.

The Due Process clause is a guaranty and shield against the oppression and arbitrariness of any governmental agency, or authority, whether executive, legislative, or judicial.

The petitioning City recognizes that the guaranty of due process is not a guaranty against judicial error. **Bell Telephone Co. v. Pennsylvania Public Utility Comm.**, 309 U. S. 30, 84 L. Ed. 563, 60 S. Ct. 411.

However, it prays the protection of this Court under the principle that the guaranty of due process "is a guaranty that the fundamental principles of justice shall not be violated." **16 A Corpus Juris Secundum**, par. 569(1), p. 565. **Title, Constitutional Law.** State v. Rossi, 71 R. I. 284, 43 A (2) 323.

This is such a case.

CONCLUSION

This may appear to be a small case, but the principles involved are of transcendent importance.

The decrees complained of violate the fundamental principles of justice guaranteed by the Fifth and Fourteenth Amendments of the United States. Constitution and, therefore, the writ of certiorari prayed for should issue.

Respectfully submitted,

BURNETT ROTH
420 Lincoln Road
Miami Beach, Florida
Attorney for Petitioner

Of Counsel:
JOSEPH A. WANICK
City Attorney
City Hall, 1130 Washington Avenue
Miami Beach, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Petition for Writ of Certiorari and Appendix thereto has been served by mail upon HOLLADAY & GARDNER, Attorneys for Respondents, 250 Bird Road, Coral Gables, Florida, this —— day of August, 1966.

APPENDIX

FINAL DECREE

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA — IN CHANCERY NO. 64C 1634

HYMAN KIRSNER and IDA KIRSNER, his wife,
Plaintiffs,

vs.

CITY OF MIAMI BEACH, a municipal corporation,
Defendant.

THIS CAUSE came on to be heard before me at Final Hearing on Wednesday, July 22, 1964, at 9:00 a.m. Upon reading the Plaintiffs' Complaint and Defendant's Answer thereto, and after hearing argument by respective counsel, and the testimony taken before this Court and after examining the Exhibits heretofore admitted in evidence, the Court finds that the Plaintiffs are the owners of Lot 34 of that certain tract known as STAR ISLAND located within the limits of the City of Miami Beach and that they dwell thereon in their private home; that Star Island, in its entirety, is a residential area of the very highest type; that the CITY OF MIAMI BEACH maintains on said Star Island, within a stone's throw of the Plaintiffs' home, a "trim dump" area for the disposal of debris of various kinds, not limited to cuttings and trimmings of trees and shrubs, but including trash and other materials and that this situation existed for many months past; that the use to which the area has been put

as aforesaid creates a feeding ground for vermin and rodents from which unpleasant odors emanate; that the evidence affirmatively discloses that the Defendant City changed its position during the course of the litigation in that during the pleadings stage, Defendant City admitted that the "trim dump" was available for use by the residents of Star Island, and the testimony of Defendant City officials at the Final Hearing was to the effect that only City employees were entitled to use the said area to store trim and cuttings which were the by-product of maintaining the STAR ISLAND PARKWAY; that there is no basis to maintain the said area if the only purpose it would serve would be to store trim and cuttings from the Parkway; that people and trucks from other areas bring trim and trash and dump it in the area; that the Defendant City placed a sign at the entrance to the said area which invited Star Island residents to "dump" things in the said area; that many other items of trash, including a discarded refrigerator, had been placed in the said area; all to the distinct disadvantage and detriment of the Plaintiffs in the enjoyment of their home and that the maintenance of the "trim dump" is a nuisance as to them, specifically.

It further appears that a certain deed dated May 6, 1943, from MIAMI OCEAN VIEW COMPANY, wherein the said company was the grantor and the CITY OF MIAMI BEACH the grantee, which deed was duly filed of record, contained a restrictive covenant limiting the use of the STAR ISLAND PARKWAY "for park purposes only" and that this covenant is a subsisting valid restriction. It further appears that the Defendant City has breached the said restrictive covenant.

It further appears that although the Plaintiffs duly demanded of the Defendant that it remove the dumping ground, the Defendant failed and refused to do so. Therefore, after due deliberation, it is

ORDERED, ADJUDGED AND DECREED as follows:

1. That this Court has jurisdiction of the subject matter hereof and of the parties hereto.

2. That the Plaintiffs have shown by substantial competent evidence that they are entitled to the relief prayed for in their Complaint, including the injunction prayed for therein.

3. That the CITY OF MIAMI BEACH, its representatives, employees and agents are hereby and herewith ordered and directed within thirty (30) days from the date hereof to do the following:

a) Remove any and all refuse, trim, cuttings, and waste matter and other foreign materials presently located in the "trim dump" being maintained by the Defendant on the STAR ISLAND PARKWAY.

b) Remove the presently existing hedge which delineates the area of the said "trim dump."

c) Landscape the area which is presently being used as a "trim dump" in conformity with the rest of the STAR ISLAND PARKWAY.

4. That the Defendant, CITY OF MIAMI BEACH, be, and it is hereby, permanently enjoined from using any of the land of STAR ISLAND PARKWAY as a dumping ground for any and all refuse and waste matter and other foreign materials.

5. This Court shall retain jurisdiction of the parties and of the matter to make any further orders with respect to carrying out the purposes and intendments of this Final Decree.

6. That costs of these proceedings be taxed against Defendant on due notice.

DONE AND ORDERED in Chambers, at the Dade County Courthouse, Miami, Dade County, Florida, this 3rd day of August, 1964.

/s/ Harold R. Vann
CIRCUIT JUDGE
for Judge Ray Pearson

[TITLE OMITTED]

Opinion filed August 10, 1965.

An Appeal from the Circuit Court for Dade County, Ray Pearson, Judge.

Joseph A. Wanick, City Attorney, for appellant.

Leef & Ankus; Holladay & Gardner, for appellees.

Before HENDRY, C. J., and CARROLL and BARKDULL, JJ.

PER CURIAM.

The appellant, the City of Miami Beach who was the defendant below, has appealed from an adverse final decree. At suit of property owners residing on Star Island, a part of Miami Beach located in Biscayne Bay, the city was enjoined to discontinue its designated 100 x 100 foot dump area located in and on a 1,700 x 100 foot central parkway area on the island, previously acquired by the city by a deed containing a restriction against its use for other than park purposes. The decree also directed removal of a hedge surrounding the dump area and that such area be landscaped in conformity to the remaining park area.

It was alleged and shown that although intended for dumping the trim (grass and shrubs) of Star Island residents, the dump area was so used by residents of other connected islands and included unsightly debris. There were allegations of resultant odors and attracted vermin.

The chancellor held the allegations of the complaint were established and that plaintiffs were entitled to the relief sought; and that the restriction against use other than as a park was binding and the city's use of the dump area thereon was in violation of the restriction.

We have considered the several contentions presented by the appellant, including the argument that the decree was too broad, and we find them to be without merit. The record discloses sufficient evidentiary support for the findings and conclusions of the chancellor.

Affirmed.

[TITLE OMITTED]

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date August 10, 1965 and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

CC: Honorable W. P. Carter, Clerk
Honorable E. B. Leatherman
Honorable Joseph A. Wanick
Messrs. Holladay & Gardner

[TITLE OMITTED]

Petitioner has filed motion for stay; and upon consideration thereof, said motion is granted, and it is ordered that all proceedings in the District Court of Appeal, Third District of Florida, and the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, are hereby stayed for a period of sixty (60) days from the date of this order to enable petitioner to seek review in the Supreme Court of the United States and to apply to that Court for any further stay.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

cc: Honorable Joseph A. Wanick
Messrs. Holladay & Gardner
Honorable W. P. Carter
Honorable E. B. Leatherman

I, E. B. LEATHERMAN, Clerk of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, DO HEREBY CERTIFY that the attached and foregoing pages numbered from 1 to 17 constitute a true and correct copy of such part of the transcript of record of the Circuit Court in and for Dade County, Florida (Chancery Cause No. 64C 1634); and of the Opinion of the District Court of Appeal of Florida, Third District, (Case No. 64-932, dated August 10, 1965), the order of the Florida Supreme Court denying certiorari (Case No. 34,835) dated March 30, 1966; the order of the Florida Supreme Court denying petition for rehearing; and the Stay Order entered by the Florida Supreme Court on July 7, 1966; and contain a true and correct recital and copy of all such papers and proceedings in said cause which have been directed to be included in said record; all as the same appears among the records and files of my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Circuit Court, Dade County, Florida, this 12th day of August, 1966.

HON. E. B. LEATHERMAN
Clerk, Circuit Court
Dade County, Florida

/s/ M. RIDENOUR
Deputy Clerk

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IN THE SUPREME COURT OF THE UNITED STATES

October Term A. D. 1966

Case No. 448

CITY OF MIAMI BEACH,
a municipal corporation, *Petitioner*,

vs.

HYMAN KIRSNER and IDA KIRSNER,
his wife, *Respondents*.

BRIEF OF RESPONDENTS

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IN THE SUPREME COURT OF THE UNITED STATES

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a municipal corporation, *Petitioner*,

vs.

HYMAN KIRSNER and IDA KIRSNER,
his wife, *Respondents*.

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The decision of the Third District Court of Appeal in the case at bar provides a very concise statement of the case in its posture before that court. That decision entered August 10, 1965, is as follows:

"PER CURIAM.

The appellant, the city of Miami Beach who was the defendant below, has appealed from an adverse final decree. At suit of property owners residing on Star Island, a part of Miami Beach located in Biscayne Bay, the city was enjoined to discontinue its designated 100 x 100 foot dump area located in and on a 1,700 x 100 foot central

parkway area on the island, previously acquired by the city by a deed containing a restriction against its use for other than park purposes. The decree also directed removal of a hedge surrounding the dump area and that such area be landscaped in conformity to the remaining park area.

It was alleged and shown that although intended for dumping the trim (grass and shrubs) of Star Island residents, the dump area was so used by residents of other connected islands and included unsightly debris. There were allegations of resultant odors and attracted vermin. The chancellor held the allegations of the complaint were established and that plaintiffs were entitled to the relief sought; and that the restriction against use other than as a park was binding and the city's use of the dump area thereon was in violation of the restriction.

We have considered the several contentions presented by the appellant, including the argument that the decree was too broad, and we find them to be without merit. The record discloses sufficient evidentiary support for the findings and conclusions of the chancellor.

Affirmed."

Thereafter, the Florida Supreme Court denied the City's petition for a writ of certiorari by its order entered March 30, 1966. The City filed its petition for rehearing complaining that:

"1. The Court overlooked or failed to consider that the Decree of the Circuit Court, as affirmed by the Third District Court of Appeal, enjoins the City from using its own property for the lawful purpose of a temporary collecting point for tree trimmings and grass cuttings resulting from the City landscaping this identical property. The City is thus being deprived of its legal right to use said property for a lawful purpose in violation of the Fourteenth Amendment of the United States Constitution.

2. The Court overlooked or failed to consider that the Decree complained of, which requires the City to destroy the trees on its own property, is in direct conflict with the decision of this Honorable Court in the case of *In Re Seven Barrels of Wine*, 79 Fla. 1, 83 So 627, holding that a nuisance may be abated, but inoffensive private property may not be arbitrarily destroyed, and that such decree deprives the City of Miami Beach of its property without due process of law and in violation of the Fourteenth Amendment to the United States Constitution.

3. The Court overlooked or failed to consider that the Decree of the Circuit Court, as affirmed by the Third District Court of Appeal, is in direct conflict with the decision of this Court in *State ex rel Knight vs. City of Miami*, 53 So 2d 636.

4. The Court overlooked or failed to consider that the decision of the Circuit Court, as affirmed

by the Third District Court of Appeal, is in conflict with the decision of this Court in *Beckman vs. Marshall*, 85 So 2d 552, holding that 'trifling annoyance, inconvenience, or discomfort' is no basis for injunctive relief and that the law does not 'prohibit all use of one's property which annoys or disturbs his neighbor, but rather prohibits a use which constitutes injury to a legal right of the neighbor.'

5. The Court overlooked or failed to consider that the decision of the Circuit Court, as affirmed by the Third District Court of Appeal, is in conflict with the decision of this Court in *Beckman vs. Marshall*, 85 So 2d 552, which holds that the 'inquiry is whether the act or use was a reasonable exercise of the dominion, which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy.' The denial by the Circuit Court and the Third District Court of Appeal of the City's exercise of its dominion over its property in accordance with the standards so delineated deprives the City of its property rights in violation of the Fourteenth Amendment of the United States Constitution."

This petition marked the first time in the case that a Federal question was raised and even then the City suggested that the Florida Supreme Court had overlooked or failed to consider applicable Florida decisional law. The court denied this petition without opinion on May 17, 1966.

The Petitioner now seeks the jurisdiction of the United States Supreme Court for review of this case, praying for issuance of a writ of certiorari to the Supreme Court of the State of Florida; to the Third District Court of Appeal of Florida; and, to the Circuit Court of the Eleventh Judicial Circuit of the State of Florida.

ARGUMENT

The Petitioner acquired the city park, which is the subject matter of the case at bar, by a deed containing a restriction that it use the property "for park purposes only". The orders and judgments of the Florida state courts have merely ordered the City to use its property for park purposes only, as required in the deed. This requirement, according to the Petitioner, deprives it of the use of its property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The Respondents' argument will be limited to the applicable law relating to the court's jurisdiction under the Fourteenth Amendment as it is without question that the Fifth Amendment is obligatory only on the United States, and is applicable only in federal courts, not in state courts.

Generally, it is understood that a Federal question must be raised prior to the final decision of a state court, and that it is just too late when it is presented in a petition for rehearing before the highest state court, unless that court entertains the petition and expressly passes upon the Federal question raised. *Durley v. Mayo*, 351 U.S. 277, 100 L.Ed. 1178, 76 Sup.Ct. 806, rehearing denied 352 U.S. 859, 1 L.Ed.2d 69, 77 Sup.Ct. 22; *Radio*

Station WOW, Inc. v. Johnson, 326 U.S. 120, 89 L.Ed. 2092, 65 Sup.Ct. 1475; *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U.S. 300, 61 L.Ed. 1153, 37 Sup.Ct. 643; *Adams v. Russell*, 229 U.S. 353, 57 L.Ed. 1224, 33 Sup.Ct. 846; *Bachtel v. Wilson*, 204 U.S. 36, 51 L.Ed. 357, 27 Sup.Ct. 243; *Anno:* 67 L.Ed. 557, 560, *54 Am.Jur., United States Courts* §217.

In the case of *Allen v. Arquimbau*, 198 U.S. 149, 49 L.Ed. 990, 25 Sup.Ct. 622, a writ of error to the Supreme Court of Florida was dismissed as follows:

> "The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad; but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction. Dibble v. Bellingham Bay Land Co. 163 U.S. 63, 41 L.ed. 72, 16 Sup.Ct.Rep. 939; Klinger v. Missouri, 13 Wall 257, 20 L.ed. 636; Johnson v. Risk, 137 U.S. 300, 34 L.ed. 683, 11 Sup.Ct. Rep. 111."

It is evident that, before the jurisdiction of the United States Supreme Court over a state court can be sustained, it must appear from the record that the state court actually considered and passed upon the Federal question when it was first raised in the petition for a rehearing in the highest state court. In *McCorquodale v. Texas*, 211 U.S. 432, 53 L.Ed. 269, 29 Sup. Ct. 146, where a Federal

question was presented for the first time in the defendant's petition for a rehearing, the state court's order read:

> "This cause came on to be heard on appellant's motion for rehearing, and, the same being considered by the court, said motion is overruled."

In its review of the order, the United States Supreme Court said:

> " . . . this court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing, in the court of last resort of a state, after that court has pronounced its final decision. . . . It is true that we have also decided that if the court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the court has done so."

There is nothing better settled than it is too late to raise a Federal question for the first time in a petition for a rehearing after the final judgment of the highest state court. This is especially true when the petition is denied without opinion. *Booker v. Fidelity Trust Co.*, 261 U.S. 114, 67 L.Ed. 556, 43 Sup.Ct. 288; *Citizens National Bank v. Durr*, 257 U.S. 99, 66 L.Ed. 149, 42 Sup.Ct. 15; *Godchaux Co. v. Estopinal*, 251 U.S. 179, 64 L.Ed. 213, 40 Sup.Ct. 116; *Consolidated Turnpike Co. v. Norfolk and V. R. Co.*, 228 U.S. 326, 57 L.Ed. 857, 33 Sup.Ct. 310; *Bushnell v. Crooke Mining and Smelting Co.*, 148 U.S. 682, 37 L.Ed. 610, 13 Sup.Ct. 771.

In the case at bar the Petitioner, like so many others in the cases cited by the Respondents, first deemed it advisable to raise a Federal question in its petition for rehearing before the Florida Supreme Court upon that court's denial of the Petitioner's writ of certiorari. This petition, in addition to the Federal question, suggested that the Florida Supreme Court "overlooked or failed to consider" several Florida cases which were claimed to be in conflict with the decision of the Circuit Court as affirmed by the Third District Court of Appeal.

Just as in the *Allen* case supra, and following closely the wording of the Texas court in *McCorquodale v. Texas* supra, the Florida Supreme Court denied the petition for rehearing without opinion. Thus, there is no way to determine whether or not the Federal question was considered by the court or the grounds for the court's order, other than the obvious observation that the Florida Supreme Court did not feel it had sufficient grounds to invoke its jurisdiction.

Applying the law to the facts of the case at bar is just like adding another carbon copy to the long line of decisional law on this subject. There has been no difficulty whatsoever in finding ample support for the Respondents' contention that the petition should be denied.

The Petitioner, of course, had the right to raise the Federal question in the Circuit Court and to require that court to rule upon the Federal question in its final decree. If the Petitioner had followed that procedure, it would have been allowed to appeal the final decree directly to

the Florida Supreme Court as a matter of right. *Constitution of the State of Florida, Article V §5(3).*[1]

Although this may have been the better procedure in the best interests of the Petitioner, a misapprehension by a litigant of the steps which its best interests required during a trial is not a ground for interference by a court as a denial of constitutional rights. *City Market Street Railway Co. v. Railway Commission of State of California*, 324 U.S. 548, 89 L.Ed. 1171, 65 Sup.Ct. 770. The legal impact that this case may have upon the City has not changed from the time it was first filed, yet the city did not raise a Federal question until the petition to the Florida Supreme Court for rehearing. The Florida Supreme Court without delay, entered its order denying the petition.

The City in its petition before this court states that, "the judicial decrees complained of confiscate and take away this park from the City without compensation." This is simply not true. This city park which is approximately 1,700 feet long and 100 feet wide continues to be owned by the City, subject to the restriction that it be used "for park purposes only" as required in the deed of conveyance to the City. The effect of the judicial decrees complained of is that the City will be required to remove the 100 x 100

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[1]This section entitled, "Jurisdiction" provides that: Appeals from trial courts in each appellate district, . . . may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court." *Florida Appellate Rule 2.1a(5)(a)* provides that: "Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only . . . from final judgments or decrees . . . construing a controlling provision of the Florida or Federal Constitution, . . ."

foot dump that it has maintained in front of the Respondents' home. The City actually stands to gain by this, since, when the dump area is landscaped in conformity with the remainder of the park area, it will add to the beauty of Star Island.

The Respondents must also comment on the City's claim in its petition that, "the decree requires the City to perpetually expend money in the maintenance of the park in its present state for the benefit of a single individual." In the first place, the decree requires that the City change the present state of the park by removal of the dump and relandscaping of that area. Secondly, Star Island is a fully developed residential area of the very highest type having many valuable homes surrounding the park which is in the center of the island. It is obvious that the maintenance of the park is for the benefit of all the home owners on Star Island, as well as all of the citizens of the City of Miami Beach.

CONCLUSION

Under the circumstances presented in the case at bar, it is submitted that not only was the City too late by raising a Federal question for the first time in its petition for rehearing before the Florida Supreme Court, but that all of the fundamental principals of justice guaranteed by the Fourteenth Amendment of the United States Constitution have been amply bestowed upon the City so that now the Respondents are entitled to have the decrees enforced by the Florida courts. Therefore, the Respondents pray that the court deny the Petitioner's writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Brief of Respondents has been served by mail upon BURNETT ROTH, Attorney for Petitioner, 420 Lincoln Road, Miami Beach, Florida, this 8th day of September, 1966.

John M. Thomson